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No. 80-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONER,

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

[redacted]Brief of The State of North Carolina Appearing, Amicus Curiae, In Support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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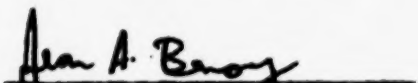
Motion for Leave to File the Attached Brief of The State of North Carolina Appearing, Amicus Curiae, In Support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

NOW COMES the State of North Carolina, through its Attorney General, and moves this Honorable Court for leave to file its Brief

pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED, this the 19th day of June, 1981.

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I. INTEREST OF THE STATE OF NORTH CAROLINA IN APPEARING AS AMICUS CURIAE

A. The Court of Appeals held in this case that the State, through its Attorney General, by settling the State's injunction and damage action for its direct purchases, forever barred a multi-million dollar treble damage antitrust action of the city and county boards of education for their direct purchases from Respondents -- this in spite of the fact the boards were not named as party plaintiffs in the prior action; that the Attorney General told Respondents prior to settlement, and at the time the Consent Judgment was signed, that he was not settling for the boards of education; never mentioned them as parties to the Consent Judgment; and signed that Judgment on behalf of the State only.

The Attorney General specifically informed the Courts below of the above facts in his briefs, oral argument and deposition testimony. Yet the District Court held the city

and county boards of education were "parties" to the State's action while the Court of Appeals held they were not. Instead the Court of Appeals used the concept of "privity" to support its holding of res judicata in bar of Petitioner's claims even though: it has its own independent standing to sue under both state and federal antitrust law; it never had a full and fair opportunity to present its evidence and argument in support of its claims; and neither knew of nor consented to the State's Consent Judgment.

B. The Court of Appeals decision disregards and limits the discretion of the State Attorney General of North Carolina. In the State's case, he elected to represent the State directly; and, the school boards only in the event a class action was certified by the Superior Court and then only as their class representative. The Court of Appeals opinion ignores his exercise of discretion and holds

that he did bind the school boards for purposes of res judicata even though he expressly did not.

C. If the decision of the Court of Appeals stands it will seriously interfere with the enforcement of the antitrust laws in North Carolina because the Attorney General can never be sure whom he will bind by his representation, and consequently both the commencement and settling of antitrust cases in North Carolina will be considerably chilled.

II. SUMMARY OF THE ARGUMENT

A. The doctrine of res judicata cannot bar a person from litigating his claim unless that person has had one fair and full opportunity to present his evidence and argument in support of his claim and has failed in that effort. Here Petitioner has never had any opportunity to do so. Thus, by the Court of Appeals decision, Petitioner has been denied constitutional guarantees of due process of law.

B. In State of Florida, ex. rel. Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976), that Court gave effect to and enforced the discretion as exercised by the Florida Attorney General in that case. Here, the Court, while citing Florida v. Exxon, has not. Instead, the Court gives no effect whatsoever to the discretion actually exercised by the Attorney General which discretion is lawfully granted to him by North Carolina law.

C. The duties of the Attorney General of North Carolina are found in literally hundreds of statutes in fourteen volumes of the General Statutes of North Carolina. Among them is the duty to enforce the State's antitrust policy and laws. Wide discretion is allowed him as to the manner, means and actions he may maintain to enforce this policy. If permitted to stand, the decision below will have a chilling effect upon the exercise of his discretion because he can not now know whose claims he is disposing of.

III. ARGUMENT

Introduction

"The facts . . . are not in dispute", Nash County Board of Education v. The Biltmore Co., et al, 640 F. 2d 484, 485 (4th Cir. 1981) (Pet. App. p. 43). However an examination of the record reveals that crucial matters stated as facts by the courts below and relied upon in their opinions are, in fact, erroneous.

In the District Court's Memorandum of Decision, 464 F. Supp. 1027, 1037, (E.D.N.C. 1978), (Pet. App. p. 38) the Court states:

> Because the Attorney General [in the State action] acted pursuant to the broad, unencumbered authority, he did not require explicit consent from the constituent school boards in order to bind them to the terms of the decree. (Emphasis added)

and the Court is referring to G.S. 114-2, (3A Part II, General Statutes of North Carolina, Replacement 1978, p. 248), 464 F. Supp. at 1033, (Pet. App. pp. 24-25). G. S. 114-2 is set out fully in Appendix "A" attached hereto.

In fact, the Attorney General acted expressly and solely under the authority of G.S. §§ 75-14-16 (2C General Statutes of North Carolina, Replacement 1981, pp. 269-271) (Pet. App. pp. 127-128) which relate only to antitrust and consumer protection actions. The provisions of G.S. 114-2 were never mentioned in the State's action (Pet. App. pp. 85-104).

Yet, based solely upon the general authority of the Attorney General to act under G.S. 114-2, supra, in all matters, the District Court at 464 F. Supp. 1036 (Pet. App. p. 35), held:

> . . . the Court concludes, that by virtue of the Attorney General's participation in the prior state court antitrust action, Nash County was a 'party' in that action for purposes of res judicata. (Emphasis added)

Clearly the District Court made its decision solely upon what authority the Attorney General generally possesses instead of what authority the Attorney General actually exercised in the state action. It was on the mere existence of such general authority that the

District Court held Petitioner to be a "party" to the State's prior action.

The Court of Appeals states, however, 640 F. 2d at 493, (Pet. App. p. 72):

> In this case, there is no contention that the plaintiff was a party to the earlier suit begun in the name of the State of North Carolina by its Attorney General, which ended with a consent judgment. The defendants did claim, though, that the plaintiff in this suit was in privity with the plaintiff in that earlier action by the Attorney General and thus is bound by the consent judgment therein.

The District Court never mentioned "privity". In fact, the District Court noted at 464 F. Supp. 1030, (Pet. App. p. 11):

> "As will be explained more fully below Nash County was a party plaintiff in the Attorney General's state antitrust action."

Next, the Court of Appeals stated that other of the crucial essential facts upon which its decision turned were:

> . . . [The Attorney General] identified the parties he asserted the right to

> represent as 'each public school system . . .' 640 F. 2d 485, (Pet. App. p. 44)
>
> * * * *
>
> Both suits deal with the same subject matter, i.e., the purchase of fluid milk and milk products solely by the various school districts in North Carolina. They involve no other purchases . . . 640 F. 2d at 488, (Pet. App. p. 54) (Emphasis added)

while the District Court correctly noted that:

> The Attorney General was suing on behalf of the state as a direct purchaser of milk from the defendants . . . 464 F. Supp. 1034 (Pet. App. p. 26) (Emphasis added)

and for injury sustained by the State as "one of the sources of revenue used to pay part of the purchase price of milk bought from the [Respondents] by [Petitioners]" Id. I.e., for its injury as an indirect purchaser. Additionally, "he sued as the purported class representative . . ." Id., of each public school system as well as for "permanent injunctive relief". Id. See ¶1 of the Attorney General's complaint (Pet. App. pp. 85-88) for a clear statement of whom the party plaintiff was in the state's action, and ¶4 to see in what capacity the Attorney General sought to

represent "each public school system".

Clearly, the Attorney General at the pleading stage was only alleging a class action and in his prayer for relief he requested the Court to establish such a class. (Pet. App. p. 94).

A. THE STATE'S ACTION UNDER STATE LAW IN STATE COURT DID NOT, AND CONSTITUTIONALLY COULD NOT, BAR PETITIONER'S SUBSEQUENT DAMAGE CLAIMS UNDER THE FEDERAL ANTITRUST LAWS IN FEDERAL COURT, UNDER THE DOCTRINE OF RES JUDICATA.

In a significant case involving a plea of res judicata, Blonder-Tongue Lab., Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), Justice White, speaking for a unanimous Court, said:

> . . . the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.
>
> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or

> more existing adjudications of the identical issue which stand squarely against their position. See Hansberry v. Lee, 311 U.S. 43, 40 (1940). (Emphasis added)

Moreover, as stated in Restatement of the Law of Judgments § 79, p. 357, American Law Institute, St. Paul, Minn. (1942) even

> [i]f a person is named as a party to the action but is neither named nor otherwise described in the judgment, he is not a party to the judgment and is not affected by the decision of issues leading to it; . . .

In Parklane Hosiery Co., Inc. et al v. Shore, 439 U.S. 322 (1979), Justice Stewart noted in footnote 13, at 330, that application of estoppel would be denied if the party asserting it "could have affected joinder in the first action between himself and his present adversary" and declined to do so. Here Respondents considered the idea and rejected it.

The facts of the State's action in state court are that on October 21, 1974, the Attorney General, in the exercise of his discretion, as authorized by G.S. 75-14, 15, and 16, (Pet. App. pp. 127-128) instituted an action against

Respondents on behalf of the State of North Carolina which was the only named plaintiff (Pet. App. pp. 85-86). In that action, he sought:

(1) permanent injunctive relief against Respondents' future violations of the state's antitrust laws (Pet. App. p. 85 (Caption), p. 94 (Prayer 1,d)), to protect the state's general economy and to enforce the State's policy prohibiting combinations in restraint of trade, i.e., a parens patriae action which the State unquestionably has standing to do, even though the State cannot recover damages for injury to its general economy. Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972);

(2) monetary damages to the State for its prior direct purchases of fluid milk from Respondents, which it clearly has standing to do; (Pet. App. p. 87);

(3) monetary damages to the state for its prior indirect purchases of fluid milk from

Respondents. This Court has subsequently held the State has no standing to sue for such damages. Illinois Brick Co., v. State of Illinois, 431 U.S. 720 (1977); and

(4) to establish the action as a "class action" under Rule 23 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 23, (1A General Statutes of North Carolina, Replacement 1969, p. 640) which would have included Petitioner if the Court has established such a class and if Petitioner, subsequent to establishment of such class did not opt out of the action. But no class was ever established.

B. THE FEDERAL COURTS SHOULD NOT INTERFERE WITH THE LAWFUL DISCRETION AS EXERCISED BY THE ATTORNEY GENERAL REGARDING AN ACTION HE INSTITUTED FOR THE STATE.

In Florida, ex. rel. Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit affirmed the authority and discretion of that State's Attorney General to bring

units of local government into an action as named parties without their prior consent. However, Shevin does not stand for the proposition that simply because the Attorney General possesses general authority and wide discretion to represent the State and units of local government, this alone, as a matter of law, makes them all parties to cases he brings on behalf of the State, whether he names them as parties plaintiff or not.

As the Attorney General has the discretion and authority to positively bring local governments into an action as parties with the State, he has the correlative discretion and authority to refrain from bringing them into an action as parties with the State.

The decision of the Courts here effectively hold that as a matter of res judicata under federal law, the Attorney General can not refrain from representing every person he is authorized to represent in actions he institutes on behalf of the State. The Shevin case dictates no such result.

The Attorney General further contends that he is authorized and has the requisite discretion to do as he did in the State's action against Respondents here, which was to institute an action by the State; request the court to certify the action as a "class action" under Rule 23, so that members of the alleged class, (the local boards of education) after notice, would have the option at their discretion to: (1) stay in the class as parties to the action with the Attorney General acting as their counsel; or (2) to stay in the class as parties with counsel of their own choosing; or (3) to "opt out" of the class and go their own way under Rule 23 of the North Carolina Rules of Civil Procedure. See Eisen v. Carlisle and Jacquelin, 391 F. 2d 555 (2nd Cir 1968).

The decision here effectively prevents the use of Rule 23 by the State and the Attorney General. No decisions of any courts, federal or state, prior to the case here reach such a result and the general authority granted to the Attorney General contemplates

no such result.

C. THE DECISION OF THE COURT BELOW, IF ALLOWED TO STAND WILL HAVE A CHILLING EFFECT UPON THE EXERCISE OF DISCRETION OF THE ATTORNEY GENERAL IN ANTITRUST LAW ENFORCEMENT IN THE PERFORMANCE OF HIS LAWFUL DUTIES.

The decision below, if allowed to stand, must have a chilling effect on the Attorney General of North Carolina when he contemplates commencing or settling an antitrust action under the express and specific duty to enforce the State's policy and laws to prevent and prohibit illegal combinations in restraint of trade because, under the decisions below, the Attorney General can no longer rely on the effective exercise of his discretion. Simply put, he can not now know whose claims he may be representing or disposing of even when he explicitly names only the State as the plaintiff.

In the State's action used as a bar to the Petitioner's action in federal court, the Attorney General specifically indentified who the singular party plaintiff was, i.e., the State of North Carolina. (Pet. App. p. 85)

The Attorney General identified who the Defendants were (Pet. App. p. 86). The Attorney General's reference to the "various public school systems in North Carolina" was as a reference point as one of the sources of injury to the State and thus such indirect purchases were part of its claim for damages. (Pet. App. p. 87).

Additionally, ¶4b of the State's complaint describes "public school systems" for the purposes of identifying who was to be included in the class action <u>if</u> the class action was certified. There is no reference whatsoever to local "public school systems" otherwise being parties plaintiff in the state's action.

In the Consent Judgment, the parties to it are clearly set forth. (Pet. App. p. 97). There the judgment recites

> from statements . . . made by counsel for the Defendants mentioned in the caption above and counsel for the Plaintiff . . . all matters . . . have been agreed upon and settled in a manner satisfactory <u>both to the Plaintiff</u>,

State of North Carolina and to the the aforementioned defendants. (Pet. App. p. 97) (Emphasis added)

There is no reference in the Consent Judgment to any local boards of education ever being parties to the action in the first instance or parties to the judgment in the second instance.

The judgment obtained required the Respondents to do certain things in the future, with reference to the Attorney General. Specifically, each defendant was required to forward copies of all bids and negotiated prices to any public school system within the State of North Carolina to the Attorney General. (Pet. App. pp. 99, 101). The language of the consent judgment which refers to the "public school systems" are not references to them as parties but are only reference points to enable the Respondents and the Attorney General to know with precision precisely what submissions were to be made to the Attorney General by the Respondents in complying with the judgment entered.

IV. CONCLUSION

The State of North Carolina, as Amicus Curiae, requests this Court to:

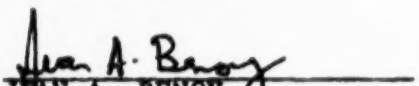
1. Grant Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit;

2. Vacate the decisions of the Court of Appeals and the U.S. District Court for the Eastern District of North Carolina; and

3. Remand the case to the District Court for further proceedings to enable the Petitioner to have one full and fair opportunity to present its evidence and arguments in support of its claims and those of the class it seeks to represent.

RESPECTFULLY SUBMITTED, this 19th day of June, 1981.

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Attorney General of
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§ 114-2, General Statutes of North Carolina

§ 114-2. **Duties.** — It shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

(3) Repealed by Session Laws 1973, c. 702, s. 2.

(4) To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office.

(5) To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

(6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.

(7) To compare the warrants drawn by the Auditor on the State treasury with the laws under which they purport to be drawn.

(8) Subject to the provisions of G.S. 62-20:

a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

b. Upon the institution of any proceeding before any State agency by application, petition or other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney General with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies.

APPENDIX "A"

Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served this Amicus Curiae Motion and Brief in support of Petitioner's Petition for a Writ of Certiorari upon all of the parties to this action by depositing three copies of the Motion and Brief in support, in the United States Post Office at Forest City, North Carolina with first class postage prepaid addressed to the following counsel of record whose names at their post office addresses are as follows:

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